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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-627

RICHARD ANTHONY MAYES,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

PETITION FOR CERTIORARI TO THE COUNTY CRIMINAL COURT AT LAW NO. 4 OF HARRIS COUNTY, THE STATE OF TEXAS

MELVIN L. WULF
MARILYN G. HAFT
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

LAWRENCE W. SAUER, JR.
3220 Louisiana, Suite 103
Houston, Texas 77006

Attorneys for Petitioner

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THE STATE OF TEXAS,

Respondent.

PETITION FOR CERTIORARI TO THE COUNTY CRIMINAL COURT AT LAW NO. 4 OF HARRIS COUNTY, THE STATE OF TEXAS

The petitioner prays that a writ of certiorari issue to review the judgment of the County Criminal Court at Law No. 4 of Harris County, Texas, entered on June 11, 1973.

Opinions Below

No opinions were rendered by the court below.

Jurisdiction

The judgment of the court below was entered on June 11, 1973 (App. *infra*, p. 5a). By order of this Court an extension of time was granted to file this petition by October 9, 1973. There is no further right to appeal within the judicial system of the State of Texas.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2).

[1] Vernon's Ann. Tex. Code Crim. Proc., Art. 4.03 (1966).

Ordinance Involved

Code of Ordinances, City of Houston, Sec. 28-42.4 (1972)

"It shall be unlawful for any person to appear on any public street, sidewalk, alley, or other public thoroughfare dressed with the designed intent to disguise his or her true sex as that of the opposite sex."

Questions Presented

1. Whether an ordinance which provides criminal penalties for disguising true sex by dressing as a member of the opposite sex violates the constitutionally protected right of privacy.

2. Whether the Eighth Amendment's prohibition against cruel and unusual punishment, as applied to the States through the Fourteenth Amendment, is violated by the conviction of petitioner solely because of his status as a transsexual.

Statement of the Case

On September 21, 1972, the Petitioner, Richard Anthony Mayes, appeared in Municipal Court No. 3 of the City of Houston for trial on the charge of disguising true sex. Petitioner had been arrested for the same crime of disguising true sex six times before, but was never brought to trial. Petitioner is a transsexual and was dressed as a woman in a pants suit outfit with a small typewritten sign reading "my body is male" pinned on the outside of his clothing. The case in court that day was dismissed, and

as Petitioner exited the Municipal Courts Building, he was again arrested by two vice squad officers and charged with disguising true sex.

On January 11, 1973, the case was tried in Municipal Court No. 3. Petitioner was found guilty (App. *infra*, p. 1a). On May 22, 1973, a trial *de novo* was heard by a jury in County Criminal Court at Law No. 4, a court of record.

At the trial the arresting officers testified that Petitioner was arrested because he was attired in women's clothing and makeup, and had long hair worn in a feminine style. They testified further that they knew and recognized Petitioner as a male who they saw habitually dressed in female attire. Petitioner testified that he was a woman and therefore dressed like one. Petitioner's doctor who is an endocrinologist testified that he diagnosed Petitioner to be a transsexual. He defined a transsexual to be a person who compulsively believes he or she belongs to the opposite sex, and is obsessed with the desire to have his or her sexual organs and appearance altered to conform to that of the opposite gender. He said that medical science has not found any organic cause or cure, other than sex reassignment surgery and hormone therapy for transsexualism, nor had psychotherapy been successful in altering the transsexual's identification with the other sex. He testified that, in following standard medical practice regarding transsexuals, he has been treating Petitioner with hormones and requiring that Petitioner live as a woman for a year and a half in preparation for sex reassignment surgery.

Petitioner was found guilty and was assessed a Fifty Dollar fine (App. *infra*, p. 2a). A motion for a new trial

was denied on June 11, 1973, and the judgment made final (App. *infra*, p. 5a). The federal constitutional claims presented by Petitioner were raised in the original trial court, and at the trial *de novo* by oral motion to dismiss after the State rested. Petitioner claimed that the ordinance violated the First, Fourth, Fifth, Eighth, Ninth, Tenth and Fourteenth Amendments.

I.

The case involves important questions of federal constitutional law which have not been but ought to be decided by this Court.

Although the Court has recently expanded and refined the definition of the right of privacy, the question remains whether that right extends to choice of personal appearance and sexual orientation. This case presents the Court with the opportunity to further define these two aspects of the right of privacy in a compelling context.

In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), the Court defined the right of privacy as "the right of the individual . . . *to be free from unwarranted governmental intrusion* into matters . . . *fundamentally affecting a person* . . ." (at 453-454, emphasis added). And in *Roe* v. *Wade*, 410 U.S. 113 (1973), the Court further clarified the concept of privacy to mean that the individual is free from unwarranted governmental intrusion in his or her right to choose a course of action that fundamentally affects that person. The right to have an abortion in *Roe* was not derived from concerns about "privacy" in the narrow sense of protecting individuals from government snooping. The fault of the

abortion laws was not that they allowed the government to find out whether someone was *having* an abortion, but that they prevented an individual from choosing to have an abortion. *Roe* v. *Wade, supra.* The right to choose may be more accurately called the right of autonomy—or the right to make certain individual decisions free from unwarranted governmental intrusion or pressure. The question is whether the right to govern one's own personal appearance is a fundamental right as are the rights pertaining to marriage, family, procreation, abortion and contraception which were endorsed by this Court in previous decisions.

The Court has never defined the scope of the right of privacy with respect to the critically important and timely subject of sexual orientation. In *Roe* v. *Wade, supra,* at 153, the majority opinion examined the profound consequences to a woman's life if she were not allowed to decide whether or not to have an abortion, including psychological harm and the possibility that the woman will lead a "distressful life" because of the unwanted child. The Court indicated that the scope of the right of privacy may depend on how fundamentally the individual's life will be affected if he or she is denied the right.

Gender identity is the awareness of oneself as male or female. It is a basic component of personality that is extremely difficult to change. Pauly, "The Current Status of the Change of Sex Operation," 147 *J. Nervous Mental Disease* 460, 467 (1968). The transsexual has the gender identity opposite to that of his or her actual physical anatomy, and dressing in clothes of the opposite sex and appearing to

the world as a member of the opposite sex are essential parts of the transsexual's gender identity. *Id.* at 463.

Clearly, the transsexual's life would be profoundly affected if he or she were forced to change gender identity.[2]

The privacy issue in this case is clearly posed without the complication of having any countervailing state interest. The state interest in this case is easily met by alternative means. The state can prevent fraudulent impersonation of the opposite sex without suppressing fundamental personal liberties, *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). While it may be feared, for example, that a man dressed as a woman would use the restroom of the opposite sex, thereby creating a disturbance, Houston has an ordinance forbidding such use of restrooms. City of Houston, Code of Ordinances, Sec. 28-42.6. And the State of Texas outlaws the use of disguises to hide one's identity when committing criminal acts, Tex. Penal Code, Art. 450 and 454 a, c-f (Vernon's 1970). Thus, the state's interests are protected by other laws which do not trample on the constitutionally protected right of privacy.

Persons who dress as members of the opposite sex are subject to criminal sanctions in many jurisdictions and to frequent and harassing arrests in substantially all jurisdictions.[3] Indeed, in the instant case Petitioner was ar-

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[2] Medical science has not found any organic cause or cure, other than sex reassignment surgery and hormone therapy, for transsexualism nor has psychotherapy been successful in altering the transsexual's identification with the other sex. "Numerous attempts at therapy, including intensive psychoanalysis, hypnosis, aversion deconditioning, chemotherapy, and behavior therapy have been generally unsuccessful . . . " Pauly, *supra* at 462, 465.

[3] Cross-dressing ordinances exist in many cities, e.g., Columbus, Ohio (Columbus Municipal Code Sec. 2343.04), Saint Louis, Mis-

rested eight times for disguising true sex and was convicted only once.

II.

Petitioner's conviction violates the Eighth Amendment's prohibition against cruel and unusual punishment, as applied to the States through the Fourteenth Amendment, because it punishes him solely for his status as a transsexual.

An essential part of Petitioner's status as a transsexual is the compulsion to wear female clothing. The Houston ordinance makes criminal the involuntary and harmless manifestation of this status.

This Court should clarify the scope of the Eighth Amendment prohibition, as applied to the States, against punishment for involuntary status. See, *Robinson* v. *California*,

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souri (Sec. 788.010 of the Revised Code of 1960, Volume 2 of the City of St. Louis), Denver, Colorado (Rev. Municipal Code 823.16 (1951). According to a recent survey of many states there are state laws in Arizona, California, Colorado, Idaho, Nevada, Oklahoma, Oregon, Texas, Utah and Washington, which render cross-dressing criminal. Erickson Educational Foundation, Legal Aspects of Transsexualism, 3 (1971). *Legal Aspects of Male Transsexualism, in Transsexualism and Sex Reassignment* 417, 420 (R. Green & J. Money eds. 1969). Some courts have held that these laws are not applicable to transsexuals. See, *e.g.*, *Columbus* v. *Zanders*, 25 Ohio Misc. 144, 266 N.E.2d 602 (1920), in which the court found that a transsexual had an irresistable impulse to dress in the clothing of the opposite sex, and thus held that a transsexual could not be convicted of appearing in public in "dress not belonging to his or her sex." In *Garcia* v. *State*, 444 S.W.2d 847 (Tex. Crim. App. 1969), a state statute outlawing the public wearing of a disguise in such a way as to hide identity was held inapplicable to a male dressed in female clothing whose identity was well known to the arresting officer.

370 U.S. 660 (1962) and *Powell* v. *Texas*, 392 U.S. 514 (1968).

In *Robinson*, the Court held that the mere status of being a narcotics addict was constitutionally protected and could not be punished criminally. However, in *Powell*, the Court held that the active expression of a status, such as the act of an alcoholic being drunk in public, is not constitutionally protected. This case clearly raises for constitutional clarification the middle ground between *Robinson* and *Powell*. The Court in *Powell* found that there was nothing inherent in the condition or status of alcoholism that dictated that an alcoholic must compulsively be drunk in public. That is not true in the case of transsexuals. An essential part of their status is the compulsion to be considered publicly as members of the opposite sex, *Pauly, supra*. The question is whether the Eighth Amendment prohibits punishment of public expression of a status when an essential and substantially involuntary ingredient of the status is to harmlessly act out and express that status in public.

The appearance in public of a transsexual in the clothing of the opposite sex is the passive and essentially involuntary expression of a status and does not harm others. Petitioner has not committed any antisocial or disorderly acts nor has he accosted anyone or attempted in any way to impose himself on other persons. This may be distinguished from the state's interest in prohibiting public drunkenness where it can be argued that a drunk person may become violent. Petitioner is no more a criminal than a person who is "mentally ill, or a leper, or . . . afflicted with a venereal disease." *Robinson* v. *California, supra*, at 666.

We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action. *Robinson* v. *California, supra,* at 678 (concurring opinion).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
MARILYN G. HAFT
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

LAWRENCE W. SAUER, JR.
3220 Louisiana, Suite 103
Houston, Texas 77006

Attorneys for Petitioner

October, 1973

Judgment and Order of the Municipal Court No. 3

Cause Number 2741527

THE STATE OF TEXAS

vs.

RICHARD ANTHONY MAYES

JUDGMENT RECORD—COURT MINUTES

Date January 11, 1973

This day this cause was called for trial, and both parties appeared, announced ready for trial, and the defendant pleaded Not guilty to the accusation in the complaint and waived a trial by jury, and the court having heard the evidence is of the opinion that the defendant is guilty as charged. It is therefore ordered, adjudged and decreed that the State of Texas, for the use and benefit of the City of Houston, Texas, do have and recover of the defendant the sum of $50.00 and all costs, $2.50, for which execution will issue, and in default of payment, that the defendant be committed to jail until said fine and costs are paid. Total $52.50.

/s/ C. RAYMOND JUDICE
Judge, Municipal Court,
Houston, Texas

Judgment of the County Criminal Court at a Trial De Novo

MINUTES OF THE COUNTY CRIMINAL COURT AT LAW
NO. 4 OF HARRIS COUNTY, TEXAS
AT APRIL TERM, 1973.

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Fine & Costs, $50.00; Trial Fee, 5.00; Dist. Atty., 15.00; Sheriff, 11.00; Clerk, 15.00; Jury, 5.00; CJPF, 5.00; Total, $106.00; Credit, ...

No. 340 529

JUDGMENT

THE STATE OF TEXAS

v.

RICHARD ANTHONY MAYES

Date May 22nd, 1973

The Defendant having been charged in the above entitled and numbered cause for the misdemeanor offense of unlawfully appear on a public street, to-wit: the 0000 block of Reisner Street Road C, dressed with the designed intent to disguise his true sex as that of the opposite sex as charged in the complaint and this cause being this day

called for trial, the State appeared by her District Attorney and the Defendant, Richard Anthony Mayes, appeared in person and by Counsel, Larry Sauer, and both parties announced ready for trial. The said Defendant was arraigned and in open court pleaded not guilty to the charge contained in the complaint. Thereupon a Jury, composed of Sam C. Pierson, Jr. and five others was selected, impanelled, and sworn; and after having heard the information read, the Defendant's plea of not guilty thereto, and the evidence submitted; and after having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant; and after having heard the argument of counsel, they retired in charge of the proper officer, and on the 22nd day of May, A.D. 1973, returned into open court the following verdict, which was received by the Court and is here entered of record upon the minutes:

We, the Jury, find the defendant "Guilty as Charged".

/s/ Sam C. Pierson, Jr.
Foreman

Thereupon, the Defendant having requested in writing at the time he entered his plea of not guilty, in open court, that the Judge assess the punishment, and in accordance with law the Court proceeded to hear further evidence on the issue of punishment.

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense of unlawfully appear on a public street, to-wit: the 0000 of Reisner Street Road C, dressed with the designed intent to disguise his true sex as that of the opposite sex as charged in the complaint, and that the said defendant committed the said

offense on the 21st day of September, A.D., 1972, a misdemeanor, as found by the jury, and that he be punished by a fine of $50.00, and that the State of Texas do have and recover of the Defendant all costs of the prosecution, for which execution will issue, and that the Defendant be remanded to jail to await the further orders of this Court.

Final Judgment and Order of the County Criminal Court

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SENTENCE

No. 340 529

THE STATE OF TEXAS

v.

RICHARD ANTHONY MAYES

Date June 11th, 1973

This day this cause being again called, the State appeared by her District Attorney and the Defendant appeared in person and by Counsel, Larry Sauer for the purpose of having sentence of the law pronounced in accordance with the verdict and the judgment rendered and entered against him on a former day of a former term. And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, to pronounce sentence against him as follows, to wit: "It is the order of the Court that the Defendant, Richard Anthony Mayes who has been adjudged

to be guilty of unlawfully appear on a public street, to-wit; the 0000 block of Reisner Street Road C, dressed with the designed intent to disguise his true sex as that of the opposite sex as charged in the complaint, a misdemeanor, and whose punishment has been assessed at a fine of $50.00 forthwith be committed to the custody of the Sheriff of Harris County, Texas, who shall confine him in the Harris County Jail until the fine and costs are fully paid and satisfied in accordance with law.

To which action of the Court the Defendant then and there, in open Court, excepted and gave notice of appeal to the United States Supreme Court, Washington, D.C.

And inasmuch as said Defendant has given notice of appeal herein, execution of the sentence is deferred to await the judgment and order of the United States Supreme Court, Washington, D.C.

Original bond remains in effect pending ruling by the United States Supreme Court, Washington, D.C.

SUPREME COURT, U. S.
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IN THE

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OCTOBER TERM, 1973

NO. 73-627

RICHARD ANTHONY MAYES,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition for Writ of Certiorari to the
County Criminal Court at Law No. 4 of
Harris County, Texas

RESPONDENT'S BRIEF IN OPPOSITION

CAROL S. VANCE
District Attorney
Harris County, Texas

JOE MOSS
Assistant District Attorney
Harris County, Texas

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548,
Capitol Station
Austin, Texas 78711

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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V.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to the
County Criminal Court at Law No. 4 of
Harris County, Texas

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

There was no opinion rendered below. Certiorari is sought to review a judgment of conviction of the County Court at Law No. 4 of Harris County, Texas, entered on June 11, 1973.

JURISDICTION

The timely filing requirements for a petition for a writ of certiorari seem to have been fulfilled in this case. Moreover, in view of a fine assessed in this case, there is, as Petitioner states, no further right to appeal the judgment of the County Court of Harris County. Respondent disputes that any rights guaranteed by the United States Constitution were denied the Petitioner in this case.

THE ORDINANCE INVOLVED

The ordinance that is the subject of these certiorari proceedings is set out at page 2 in the petition for certiorari.

QUESTIONS PRESENTED

Petitioner asserts that the following two questions are presented in these proceedings:

1. Whether an ordinance which provides criminal penalties for disguising true sex by dressing as a member of the opposite sex violates the constitutionally protected right of privacy.

2. Whether the Eighth Amendment's prohibition against cruel and unusual punishment, as applied to the States through the Fourteenth Amendment, is violated by the conviction of petitioner solely because of his status as a transsexual.

STATEMENT OF THE CASE

For the purposes of this brief, Respondent accepts the factual allegations contained in Petitioner's Statement of the Case appearing at page 2 of the petition although Petitioner questions the medical evidence adduced concerning transsexualism.

Certainly, Petitioner who is a male, was arrested for being dressed as a woman in public in the city of Houston, Harris County, Texas. It is the conviction for this circumstance, pursuant to the ordinance of the city of Houston, that is the subject of the present proceedings.

ARGUMENT AND AUTHORITIES

The Ordinance Of The City Of Houston Proscribing Persons From Going Into Public Dressed Or Disguised As A Member Of The Opposite Sex Serves A Legitimate State Interest And Is So Constitutional

Society is presently thought to have an interest in barring homosexual acts since homosexuality is, at least partially, an acquired or taught trait. Our society deems it important not to have its youth learning to be homosexual rather than heterosexual. This interest is in part rooted in the survival of the race; procreation is necessary to ensure the continuation of the human race.

Likewise, dressing or disguising as a member of the opposite sex is a step toward creating homosexual rela-

tionships and so can be proscribed in the same manner as more overt homosexual conduct.

Whether or not society is correct in making the foregoing judgments, through its representatives in the various legislative bodies of this country, is not material. The wisdom of such legislative bodies should not be set aside by the courts. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 491 (1955); *Ferguson* v. *Skrupa*, 373 U.S. 726 (1963). There is a valid state objective, the continuation of the human race, and the legislative wisdom in enacting the ordinance preventing sex disguise should be upheld.

There are other justifiable state objectives in legislation prohibiting a person from appearing in public disguised as a member of the opposite sex. An ineffective disguise may engender cat-calls and slurring remarks leading to a breach of the peace. An efficient disguise could lead to trouble after an acquaintance is formed with the disguisee and the true sex is disclosed when the friendship becomes amorous.

Accordingly, the Houston disguise ordinance should be upheld as protecting a valid state interest.

CONCLUSION

For the reasons stated above, the Petition for Writ of certiorari should be denied.

Respectfully submitted,

CAROL S. VANCE
District Attorney
Harris County, Texas

JOE MOSS
Assistant District Attorney
Harris County, Texas

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548,
Capitol Station
Austin, Texas

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, Attorney for Respondent, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been deposited in the United States Mail, postage prepaid, first class, certified on this the 21st day of February, 1974, to the following address: Mr. Melvin L. Wulf, Esq., ACLU Foundation, 22 East 40th Street, New York, New York 10016.

LONNY F. ZWIENER
Assistant Attorney General